Mohamed Moidu bin Mohamed & Anor v Hassan bin Kadir & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–205 OF 1996
SYED AHMAD HELMY JC
13 APRIL 2001

Land Law *— Indefeasibility of title and interests — Determination of interest by operation of law — Whether rights acquired under deed of sale defeated by subsequent registration under distribution order — Whether equitable interests created by deed of sale rendered registered interest defeasible — Whether rights under registered interests subject to rights under constructive trust created under deed of sale — National Land Code 1965 ss 205(3), 205(4) & 340(4)*

The plaintiffs by way of a deed of sale and irrevocable power of attorney dated 7 October 1978 ('deed of sale') purchased a portion of land ('the portion') from the defendants' father, since deceased ('the deceased') and duly paid the consideration of RM42,000 being the full purchase price and entered into possession of the portion. When the deceased passed away, the defendants as beneficiaries applied for and was granted a distribution order whereupon the land including the portion was transmitted to the defendants as registered owners in equal shares. The plaintiffs approached the defendants sometime in 1986 to effect a transfer of the portion to them but was refused. Subsequently, the plaintiffs lodged a private caveat on the land and applied to vary the distribution order but it was rejected. The plaintiffs then filed an originating summons but withdrew the same with liberty to file afresh. The plaintiffs then filed a writ action for specific performance of the deed of sale or a declaration that the plaintiffs were entitled to the portion under the deed of sale, and for the defendants to transfer the portion to the plaintiffs as co-owners of the land. The issues for determination were: (i) whether the deed of sale was valid; (ii) the nature of the interests created by the deed of sale; (iii) the nature of the rights acquired by the plaintiffs and whether these rights would be defeated by reason of the registration of the land in the names of the defendants; (iv) whether the registration of the land into the names of the defendants through the distribution order made their title indefeasible and not challengeable by the plaintiffs; and (v) whether the deed of sale was unenforceable and illegal for contravention of ss 205 and 136 of the National Land Code 1965 ('the NLC').

Held, allowing the plaintiffs' claim in part and that the plaintiffs' interest be endorsed on the title and costs:

(1) There was a binding agreement upon the terms of the deed of sale which was duly executed by the parties therein, stamped and registered with the High Court. The deed of sale had fulfilled all the requirements of the Power of Attorney Act 1949 ('the Act') by

reason of its authentication before a commissioner for oaths and deposited and duly registered in court. The power of attorney granted was expressed to be for valuable consideration and hence under s 6 of the Act it could not be revoked (see pp 298G, 299E–F).

(2) The cumulative effect of the express wording of the various clauses of the deed of sale clearly established that the true intention of the parties therein was to effect a sale of the portion to the plaintiffs (see p 300B–C).

(3) The plaintiffs had pursuant to the deed of sale acquired rights *ad rem* over the portion and pending registration of the portion into their names. The defendants' father and by devolution the defendants held the portion as constructive trustees for the plaintiffs (see p 301B).

(4) The defendants were volunteers by reason of the registration of the title into their names being through devolution. They were not and could not be termed as bona fide purchasers for value for the reason that no consideration emanated in the devolution. In such a situation their title to the land was defeasible by the equitable interests created and subsisting by the deed of sale and as such their ownership could not fall within the rule of indefeasibility as envisaged under s 340(1) of the NLC. The interest created was an interest arising by operation of law and recognizable by s 340(4) of the NLC and hence the plaintiffs could not be subjected to prove fraud, misrepresentation, forgery or unlawful acquisition as prescribed by ss 340(2)(a), (b) and (c) of the NLC in enforcing their statutorily recognizable interests as the interests so created were over and above the statutory exceptions (see p 304F–H).

(5) The sum total of the prohibitory provisions of ss 205(3) and 205(4) of the NLC would have the effect of prohibiting the plaintiffs from the relief sought of effecting registration of themselves as co-proprietors of the land which was categorized as agricultural land. However, the interest of justice dictates that the court should and must come to the aid of the plaintiffs more so in the light of the findings of the equitable interests by way of trusts created and subsisting under the deed of sale (see p 306B–D).

(6) The defendants held the land subject to the constructive trusts created in favour of the plaintiffs pursuant to the terms of the deed of sale and irrevocable power of attorney and pursuant to s 417 of the NLC, the registrar of titles and/or the land administrator as the case may be do cause an endorsement to be entered on the register of titles of the trust aforesaid in favour of the plaintiffs and the costs of the action be taxed and be paid by the defendants to the plaintiffs (see p 306D–E).

[Bahasa Malaysia summary

Plaintif-plaintif menerusi satu suratikatan jualan dan kuasa wakil yang muktamad bertarikh 7 Oktober 1978 ('suratikatan jualan tersebut') telah membeli sebahagian tanah ('bahagian tersebut') daripada ayah defendan-defendan, yang telah pun meninggal ('si mati') dan membayar balasan sebanyak RM42,000 sebagai harga belian penuh dan memperolehi milikan bahagian tersebut. Apabila si mati meninggal dunia, defendan-defendan sebagai benefisiari memohon untuk dan memperolehi satu perintah pembahagian yang mana tanah tersebut termasuk bahagian tersebut telah disampaikan kepada defendan-defendan sebagai pemilik berdaftar dalam bahagian yang sama. Plaintif-plaintif telah meminta defendan-defendan pada tahun 1986 untuk menguatkuasakan pindahmilik tanah tersebut kepada mereka tetapi telah ditolak. Berikutnya, plaintif-plaintif memasukkan satu kaveat persendirian atas tanah tersebut dan memohon supaya perintah pembahagian diubah tetapi ini telah ditolak. Plaintif-plaintif kemudiannya memfailkan satu saman pemula tetapi menarik baliknya dengan kebebasan untuk memfail yang baru. Plaintif-plaintif memfail satu tindakan writ untuk pelaksanaan spesifik suratikatan jualan atau satu perisytiharan bahawa plaintif-plaintif berhak menerima bahagian tersebut di bawah suratikatan jualan tersebut, dan agar defendan-defendan memindahmilik bahagian tersebut kepada plaintif-plaintif sebagai pemilik bersama tanah tersebut. Isu-isu untuk penentuan adalah: (i) sama ada suratikatan jualan tersebut adalah sah; (ii) ciri-ciri kepentingan yang diwujudkan oleh suratikatan jualan tersebut; (iii) ciri hak yang diperolehi oleh plaintif-plaintif dan sama ada hak-hak ini akan ditewaskan disebabkan pendaftaran tanah tersebut atas nama defendan-defendan; (iv) sama ada pendaftaran tanah tersebut atas nama defendan-defendan melalui perintah pembahagian menyebabkan hakmilik mereka menjadi tidak boleh disangkal dan tidak boleh dicabar oleh plaintif-plaintif; dan (v) sama ada suratikatan jualan tersebut tidak boleh dikuatkuasakan dan menyalahi undang-undang kerana melanggar ss 205 dan 136 Kanun Tanah Negara 1965 ('KTN').

Diputuskan, membenarkan sebahagian tuntutan plaintif-plaintif dan agar kepentingan plaintif-plaintif diendorskan pada hakmilik serta kos:

(1) Terdapatnya satu perjanjian yang mengikat ke atas terma suratikatan jualan tersebut yang telah disempurnakan dengan sewajarnya oleh pihak-pihak tersebut, dimeteraikan dan didaftarkan dengan Mahkamah Tinggi. Suratikatan jualan tersebut telah memenuhi segala keperluan Akta Kuasa Wakil 1949 ('Akta tersebut') disebabkan pengesahannya di hadapan seorang pesuruhjaya sumpah dan didepositkan dan didaftarkan seperti yang sepatutnya di mahkamah. Kuasa wakil yang diberikan dinyatakan adalah untuk balasan bernilai dan justeru itu

di bawah s 6 Akta tersebut, ia tidak boleh dibatalkan (lihat ms 298G, 299E–F).

(2) Kesan kumulatif susunan kata pelbagai fasal dalam suratikatan jualan tersebut jelas menunjukkan bahawa niat sebenar pihak-pihak yang terlibat adalah untuk menguatkuasakan satu jualan bahagian tersebut kepada plaintif-plaintif (lihat ms 300B–C).

(3) Plaintif-plaintif telah menurut suratikatan jualan tersebut memperolehi hak *ad rem* ke atas bahagian tersebut dan sementara menunggu pendaftaran bahagian tersebut dalam nama mereka. Ayah defendan-defendan dan melalui pemindahan kuasa defendan-defendan telah memegang bahagian tersebut sebagai pemegang amanah konstruktif untuk plaintif-plaintif (lihat ms 301B).

(4) Defendan-defendan merupakan sukarelawan disebabkan pendaftaran hakmilik atas nama mereka dilakukan melalui pemindahan kuasa. Mereka bukanlah dan tidak boleh digelar pembeli bona fide untuk nilai atas sebab tiada balasan telah berasal daripada pemindahan kuasa. Dalam keadaan demikian, hakmilik mereka kepada tanah tersebut boleh dicabar oleh kepentingan ekuiti yang diwujudkan dan masih wujud menerusi suratikatan jualan tersebut dan dengan itu milikan mereka tidak mungkin jatuh dalam rangkuman rukun tidak boleh disangkal sebagaimana yang dibayangkan di bawah s 340(1) KTN. Kepentingan yang dihasilkan adalah kepentingan yang timbul menerusi operasi undang-undang dan diiktirafkan oleh s 340(4) KTN dan justeru itu plaintif-plaintif tidak boleh dipaksa membuktikan fraud, salah nyata, kepalsuan atau permerolehan menyalahi undang-undang seperti yang ditetapkan oleh ss 340(2)(a), (b) dan (c) KTN untuk menguatkuasakan kepentingan yang diiktirafkan oleh kanun kerana kepentingan yang diwujudkan demikian adalah melampaui kekecualian berkanun (lihat ms 304F–H).

(5) Kesan keseluruhan peruntukan larangan ss 205(3) dan 205(4) KTN akan mencegah plaintif-plaintif daripada relief yang dipohon iaitu menguatkuasakan pendaftaran diri mereka sendiri sebagai tuan punya bersama tanah tersebut yang dikelaskan sebagai tanah pertanian. Walau bagaimanapun, kepentingan keadilan mewajarkan bahawa mahkamah harus dan mesti memberi bantuan kepada plaintif-plaintif lebih-lebih lagi memandangkan keputusan kepentingan ekuiti melalui amanah yang diwujudkan dan yang masih wujud di bawah suratikatan jualan tersebut (lihat ms 306B–D).

(6) Defendan-defendan memegang tanah tersebut tertakluk kepada amanah konstruktif yang diwujudkan memihak kepada plaintif-plaintif menurut terma suratikatan jualan tersebut dan kuasa wakil muktamad tersebut, dan menurut s 417 KTN pendaftar hakmilik dan/atau pentadbir tanah dikehendaki menyebabkan

pengendorsan dimasukkan pada daftar hakmilik amanah yang berkenaan memihak kepada plaintif-plaintif dan kos tindakan ditafsir dan dibayar oleh defendan-defendan kepada plaintif-plaintif (lihat ms 306D–E).] A

Notes B

For cases on indefeasibility of title and interests generally, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2478–2572.

Cases referred to C

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202 (refd)
Bachan Singh v Mahinder Kaur & Ors [1956] MLJ 97 (refd)
Curtis v Chemical Cleaning & Dyeing Co Ltd [1951] 1 All ER 631 (refd)
Haji Osman bin Abu Bakar v Saiyed Noor binSaiyed Mohamed [1952] MLJ 37 (refd) D
Itam bte Saad v Chik bte Abdullah [1974] 2 MLJ 53 (refd)
Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)
Kersah La'usin v Sikin Menan [1966] 2 MLJ 20 (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94 (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (refd) E
Mohamed Mustafa v Kandasami [1979] 2 MLJ 109 (refd)
Munah v Fatimah [1968] 1 MLJ 54 (refd)
Ng Kheng Yeow v Chiah Ah Foo & Ors [1987] 2 MLJ 330 (refd)
Ong Chat Pang & Anor v Valiappa Chettiar [1971] 1 MLJ 224 (refd) F
Ooi Yoke In (F) & Anor v Public Finance Bhd [1993] 2 CLJ 469 (refd)
Runin ak Pangau v Gerada (f) ak Bona [2000] 4 AMR 445 (refd)
Williams v Greatrex [1957] 1 WLR 31 (refd)

Legislation referred to G

National Land Code 1965 ss 136, 205(3), (4), 206, 207, 208, 209, 210, 211, 212, 214(1), 297, 304, 340(2), (4)(b), 342(1), 343, 347(2), 417
National Land Code (Amendment) Act 1992 s 205(4) proviso

Fadzilah Mansor (*Robert Lai* with her) (*Jackson & Masacorale*) for the plaintiffs. H

Mathews George (*Danaraj Mathews Jimmy & Sara*) for the defendants.

Syed Ahmad Helmy JC:. This case concerns a dispute over the proprietary rights over a portion of land purchased by the plaintiffs from the father of the defendants, which the defendants refused to transfer and effect registration into the names of the plaintiffs as co-owners of the land in question. I

The plaintiff's claim, as appears in the statement of claim, is based on a deed of sale and irevocable power of attorney dated 7 October 1978 ('deed of sale') whereby the plaintiffs purchased an area of approximately 21,000 sq ft ('the portion') of the land measuring an area of 1 acre 3 roods 30 poles, held under GM 482 (previously known as EMR 381) Lot 261, Mukim Plentong, Daerah Johor Bahru ('the land'), from one Abdul Kadir bin Ahmad, since deceased ('the deceased'), and who was the father of all three defendants herein. Pursuant to the deed of sale, the plaintiffs duly paid the consideration of RM42,000 being the full purchase price and entered into possession of the portion.

The deceased passed way on 17 November 1978 and the three defendants herein as beneficiaries applied for and were granted a distribution order by the collector under the Small Estate (Distribution) Ordinance 1955 on 20 April 1982 ('the distribution order') whereupon the land, including the portion, was transmitted to the defendants as registered owners in equal shares.

The plaintiffs approached the defendants sometime in 1986 to effect a transfer of the portion to them as they intended to construct a shophouse on the portion, but was refused by the defendants. The refusal by the defendants resulted in the plaintiffs lodging a private caveat on the land on 13 January 1986 to protect their interests. The plaintiffs followed up with an application to vary the distribution order to include the plaintiffs' ownership over the portion, but it was rejected.

The plaintiffs thereafter pursued their claim through Johor Bahru High Court Originating Summons No 24–522–1989, but owing to non-compliance with the consent order to convert the originating summons to writ action, the plaintiffs obtained leave of court on 8 October 1996 to withdraw the originating summons with liberty to file afresh — hence this present writ action.

The plaintiffs claim, as appears in the statement of claim herein, is in the alternative based on the deed of sale. The principal prayer is for specific performance of the deed of sale and for the defendants to transfer the said portion to the plaintiffs as co-owners of the land. The alternative prayer relates to a declaration that the plaintiffs are entitled to the portion under the deed of sale, and the defendants as trustees thereof do transfer the portion to the plaintiffs and be made the registered co-owners of the land.

The defendants in their defence averred that the plaintiffs have no beneficial nor equitable interest on the said portion and denied that they held the portion as constructive trustees for the plaintiffs, and consequently they were not duty bound to transfer the said portion to the plaintiffs. The defendants maintained that they had no knowledge of the deed and that the plaintiffs has slept on their rights (if any), and by reason thereof they are not entitled to the reliefs sought.

The defendants further maintained that by reason of the fact that the registration of the title was in the names of the defendants pursuant to the distribution order dated 20 April 1982, which distribution order was obtained without the defendants being aware or seised with knowledge of

the plaintiffs' interest, the defendants cannot be said to exercise fraud as claimed by the plaintiffs.

As the plaintiffs' claim is founded on the deed of sale, the true intention of the parties are to be gained from the document itself — *Mohamed Mustafa v Kandasami* [1979] 2 MLJ 109, and I shall now turn to the evidence presented.

On the due execution of the deed of sale, the first plaintiff (SP3) in his evidence stated that the father of the defendants, Abdul Kadir bin Ahmad, since deceased, executed the deed of sale in the presence of the Commissioner of Oaths, Mustaffa bin Mohamed (SP1) at the Johor Bahru High Court.

The plaintiffs also executed the deed of sale in the presence of SP1 who attested his signature as the attesting witness to the document. It was SP3's evidence that the total purchase price of RM42,000 had been paid to the deceased prior to the execution of the deed of sale.

Thereafter, the plaintiffs entered into possession of the portion but encountered some problems with an occupier on the portion, one Abdul Aziz, which necessitated the plaintiffs in initiating legal action and culminated in an agreement whereby the said Abdul Aziz vacated the area occupied by him on the said portion.

It was the first plaintiffs' case that the delay in developing the portion was occasioned by insufficient funds and the protracted problem with Abdul Aziz, and only after resolution of same did he decide to develop the portion into a shophouse sometime in 1996. It was at this stage that he approached the defendants to include his name in the title so as to enable him to proceed with the development of the shophouse, and after the defendants rebuffed him he lodged a private caveat on 13 January 1986.

Thereafter, the first plaintiff, on 5 October 1987, applied to the Pegawai Pentadbir Tanah to vary the distribution order made on 20 April 1982 to exclude the portion and transfer the portion into their names. The first plaintiff's application was rejected by the Pegawai Pentadbir Tanah on the grounds that they have no power to vary the distribution order and only the courts have the necessary powers. By reason thereof, the plaintiffs are now seeking the reliefs claimed in the present action.

Having perused the evidence of SP3, I am of the considered view that there is a binding agreement upon the terms of the deed of sale. The deed of sale was duly executed by the parties therein, stamped and registered with the High Court. The evidence of due execution by the parties was supported by the evidence of SP1, En Mustaffa bin Mohamed, the commissioner of oaths, who witnessed the execution by the parties of the deed of sale. I have carefully scrutinized the evidence of SP1 and have no hesitation in accepting his evidence as to the due execution of the agreement by the parties. SP1 is an independent witness and his testimony is accepted by this court. As was stated by his Lordship Raja Azlan Shah FCJ (as His Majesty then was) in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 at p 120:

> If a witness is independent ie if he has no interest in the success or failure of a case and his evidence inspires confidence of the Court such evidence can be acted upon.

An attempt was made by counsel for the defendant to challenge the deed of sale, in that the contents of the agreement was not explained to the deceased in Malay as he was illiterate. I have no hesitation in rejecting such a suggestion because though SPI states that he cannot remember whether he explained the contents of the agreement, nevertheless I accept his testimony that as commissioner for oaths he was under a duty to explain the contents. In any event, the law is quite clear that when a party signs a contract knowing it to be a contract which governs the relations between them, binding them (so to speak) then, to borrow the words of Denning J in the case of *Curtis v Chemical Cleaning & Dyeing Co Ltd* [1951] 1 All ER 631 at pp 469–470:

> … his signature is irre-fragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation.

As was aptly put by His Lordship Abdul Malik Ishak in *Ooi Yoke In (F) & Anor v Public Finance Bhd* [1993] 2 CLJ 469:

> In short, when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial: (1) whether he has read the document; or not (2) whether he knows no English and the contents were not explained to him.

I would also like to emphasize that the deed of sale has fulfilled all the requirements of the Power of Attorney Act 1949 ('the Act') by reason of its authentication before a commissioner for oaths (SP1), and was deposited and duly registered in court. The power of attorney granted was expressed to be for valuable consideration, and hence under s 6 of the Act it cannot be revoked, and furthermore there is no evidence of revocation here.

Having established the validity of the deed of sale, I know come to the question of the nature of the interests created by the deed.

It is the plaintiffs' case that the deed of sale is what it says, namely, the sale of the portion by the deceased to the plaintiffs upon the terms and conditions as stated therein. The defendants contends that the deed of sale was nothing more than to confer occupational rights for his lifetime.

The applicable principle in the construction of documents as established by the Federal Court in *Mohamed Mustafa v Kandasami* is that where there is a written agreement, the true intention of the parties is to be gained from the document itself.

Upon a careful analysis of the terms of the agreement as expressed therein, I have no hesitation in concluding that it was an out and out agreement for the sale of the portion. The recitals in the preamble identifies the land, the portion and the sale consideration of RM42,000. The deed of sale then goes on to expressly state that 'in consideration of the sum of RM42,000 (Ringgit Malaysia Forty Two Thousand), only the receipt whereof the vendor hereby acknowledges in full being the agreed purchase

price of the aforesaid premises, the vendor does hereby transfer, assign and convey all his rights, title and interest in the said portion of the property free from all encumbrances to hold the same unto the purchasers absolutely.

The deed of sale then provides by cl 2 thereof that the purchasers 'shall have possession and occupation of the said property and shall be at liberty to use and administer the same in any manner they choose and deem fit and to execute all the rights of exclusive ownership over the said portion of the property.

The deed of sale then concludes by granting the irevocable power of attorney to the plaintiffs. The cumulative effect of the express wording of the various clauses of the deed of sale clearly establishes that the true intention of the parties therein was to effect a sale of the portion to the plaintiffs.

Having ascertained that the deed of sale is a sale of a portion, the corollary question that arises is what are the rights acquired by the plaintiffs under the deed of sale and whether the rights acquired therein would be defeated by reason of the registration of the land in the names of the defendants.

Upon a valid sale and purchase agreement being executed, the plaintiffs herein have acquired rights *ad rem* over the portion. So long as he is in possession he does not lose his right simply by not proceeding at once for specific performance — *Kersah La'usin v Sikin Menan* [1966] 2 MLJ 20; *Itam bte Saad v Chik bte Abdullah* [1974] 2 MLJ 53; *Munah v Fatimah* [1968] 1 MLJ 54.

His Lordship Raja Azlan Shah (as His Majesty then was) in *Kersah La'usin v Sikin Menan* quoted at p 22 thereof the dictum of Thomson J in *Bachan Singh v Mahinder Kaur & Ors* [1956] MLJ 97:

> Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right in personam.

And at p 23 he quoted Denning LJ in *Williams v Greatrex* [1957] 1 WLR 31 at p 36:

> ... once the purchaser went into possession of the land having the contractual right to be there, he not only had an equity to be there, but also the benefit of a contract to sell him these two plots. That was not only an equity: it was an equitable interest in the land. He was in a sense the equitable owner of the land. So long as he was in possession of the land, he does not lose his rights simply by not proceeding at once for specific performance.

Even though the vendor has passed away and there is devolution of the estate to the defendants herein as beneficiaries — the rights and the constructive trust interest of the plaintiffs under the deed of sale are not jeopardized. As was stated by his Lordship Syed Agil Barakbah SCJ at pp 463–464 in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449:

> The Code restricts the kinds of interests in land which are capable of being registered, but at the same time it does not prevent or restrict the creation of beneficial interests in land by way of equitable trust...Prior to the registration of the title, the statutory form of transfer under the Code gives a title in equity to the purchaser until registration. The vendor is said to hold his proprietary interest as a constructive trustee.

In the light of the above, it is my judgment that the plaintiffs herein have pursuant to the deed of sale, acquired rights *ad rem* over the portion, and pending registration of the portion into their names, the defendant's father and by devolution the defendants herein hold the portion as constructive trustees for the plaintiffs.

Having established the nature of the interests acquired by the plaintiffs, I shall now address the question of whether the registration of the land into the names of the defendants through the distribution order makes their title indeafeasible and not challengeable by the plaintiffs herein, and the determination of same would involve an analysis of the provision of s 340 of the National Land Code 1965 ('the NLC') which governs indefeasibility of title.

The concept on indefeasibility through registration is expressly spelt out by s 340 of the NLC and it is achieved under s 297 of the NLC thereof by the registration of an instrument of dealing in the statutory form which has been executed, attested and determined fit for registration by the registrar.

Though registration confers indefeasibility, nevertheless it is not without exceptions and the statutory exceptions are spelt out in s 340(2) which provides:

> (2) The title or interest of any such person or body shall not be indefeasible —
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

Judith Sihombing in her book entitled *National Land Code, A Commentary* (2nd Ed) at p 797 states:

> The indefeasible title given on registration is subject to the statutory exceptions set out in s 340 (of the National Land Code 1965) and also to other general exceptions. First, these include in personam claims to which the proprietor is subject arising from a conscientious obligation to which he is a party. Where the proprietor is a volunteer he holds subject to obligations he has created as well as those created by his predecessor in title

The learned author goes on to state at p 800:

> The second type of interest to which the registered title is subject, outside indefeasibility, is that under an obligation which is not supported by consideration, but which does bind the proprietor.

From the commentaries aforesaid, it would appear that the exceptions to indefeasibility is not confined only to the express statutory exceptions but also to other general exceptions.

The position aforesaid seems to be shared by David Wong in his book *Tenure and Land Dealings in the Malay States* wherein, in discussing the Federal Court decision of *Ong Chat Pang & Anor v Valiappa Chettiar* [1971] 1 MLJ 224, he commented at p 339:

> Nonetheless, it is submitted that so far as the Federal Court decision ultimately turned on the failure of C, a registered transferee, in discharging the onus of proving himself to be a bona fide purchaser, it would support the general policy contention that the Malaysian Torrens System excludes volunteers from the benefit of indefeasibility of title.

As volunteers appear to be excluded from availing themselves of the benefit on indefeasibility, it is important to ascertain the meaning thereof. The word volunteer as defined in *Osborn's Law Dictionary* refers to 'a person who is an object of bounty under a will or settlement as opposed to one who gives valuable consideration'.

In this connection, it is pertinent to advert to the case of *Runin ak Pangau v Gerada (f) ak Bona* [2000] 4 AMR 445, which bears a lot of similarities with the case at hand and which reaffirms the proposition that binding interests and equities are amongst the general exceptions to the doctrine of indefeasibility through registration.

The claim by the plaintiffs therein which is similar to the claim herein, relates to a claim of their father's equitable interest in the land by virtue of an agreement entered into by the plaintiffs and defendant's respective late fathers.

The defendant applied to strike out the plaintiffs' claim and the court, in refusing the application, held that under the Sarawak Land Code (Cap 81) where the wording of the general exception on indefeasibility is much narrower than that of the NLC, a registered title to land may be made defeasible on grounds other than fraud, such as binding interests and equities, and the equity therein which devolved to the plaintiffs was their late father's equitable interest in land by virtue of the agreement.

Upon a careful perusal of the commentaries made by the learned authors aforesaid on the concept of indefeasibility under s 304 of the NLC and the decided cases therein, it is my considered view that the interest acquired by the plaintiffs herein pursuant to the deed of sale, survives the death of the defendants' father, and the transmission of the land to the defendants is subject to all the equities created by the deed of sale, and the defendants are legally bound to honour the equities so created.

This is because of the general rule that rights and liabilities under a contract pass, on the death of a party to the contract, to his personal representatives. In the book *Torrens System in Malaya* by KS Das, it is stated at p 359:

> A contract of sale is not abrogated by death, bankruptcy or other disability of the vendor (or purchaser) after the signing of the contract but before

> completion. The rights and liabilities thereunder vest in the legal representatives,...who are bound no less than the vendor (or purchaser) was bound to perform the contract and by all equities which affected the deceased … .

In *Haji Osman bin Abu Bakar v Saiyed Noor bin Saiyed Mohamed* [1952] MLJ 37, the court held that the death of the vendor did not avoid the contract; the legal personal representative of such a deceased person was the trustee for the contract, and in the absence of fraud, misrepresentations or mistake, was entitled to the land and to possession.

The learned Thomson J (as he then was) stated at p 39:

> lf a purchaser agrees to buy a piece of land and pays the purchase price then subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake he is entitled to a good title to the land and to possession and the death of the vendor does not abate his rights by one iota.

The acting Chief Justice Pretheroe at p 38 remarked:

> As death does not avoid a contract of this nature it seems clear that the same principles apply where a proprietor dies and his representative becomes the registered proprietor. As such he can, in my opinion be compelled to take all steps necessary to give effect to the contract executed by the deceased proprietor.

From the principles aforesaid, we can safely deduce that upon the plaintiffs herein paying the full purchase price the deceased became an equitable trustee to the plaintiffs in respect of the portion so purchased and when the land was transmitted to the defendants herein, the trust was also transmitted to the defendants.

The devolution of trust is statutorily recognized by the NLC through s 347(2) thereof which provides:

> Any land, share or interest vested in any person as trustee shall, on its transmission to a personal representative or representatives, continue subject to all trusts to which it was subject at that person's death.

In commenting on s 347(2), aforesaid the learned author Judith Sihombing had this to say:

> Where the deceased held the land or interest therein subject to any trust, his death does not extinguish the trust. Instead, the personal representatives succeed to the responsibility for the trusts so far as possible to the law of trusts. The subsection extends to express, implied and constructive trusts where such trusts would have been enforceable against the deceased personally. As the bare trust has now been accepted as arising on the sale of and where a valid contract is in existence, then the personal representatives will succeed to any bare trust binding on the deceased at the time of his death.

On the question of survivorship of trusts, an illuminating comment was made by G Raman in his book entitled *Probate and Administration in Singapore and Malaysia: Law and Practice* at p 127:

> A personal representative steps into the shoes of the deceased to carry out whatever contracts the deceased was a party to, except those with a personal

> element. Contracts with a personal element will be brought to an end upon death. However, where there is no personal element and the right to proceed under the contract accrues to the party entering into the contract with the deceased, the trustee would be answerable for any breaches that may be committed by the failure to comply with the requirement of the contract.

The acknowledgment of interest other than those statutorily excepted, is further confirmed by s 340(4)(b) of the NLC which provides that 'Nothing in this section shall prejudice or prevent — the determination of any title or interest by operation of law'.

The meaning of the term 'operation of law' in the aforesaid section was adverted to by the Federal Court in *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 which held that:

> Parliament enacted s 340(4)(b) of the National Land Code for the purpose of dealing with fact patterns that do not fall squarely within the other exceptions to indefeasibility that appear in the second sub-s 1 to s 340 of the National Land Code:

The Federal Court, in affirming the earlier Federal Court decision of *Ong Chat Pang & Anor v Valiappa Chettiar*, as accurately reflecting the meaning and effect of s 340(4)(b) of the NLC, adopted the views as expressed by Gill FCJ (as he then was) stated at p 1005 thereof:

> The term 'operation of law' in sub-s (vi), as Das on Torrens System in Malaya points out at p 235, is a generic term deliberately used by the legislative to grant relief in case where contractual or conscientious obligations (importing a breach of duty to which equity has attached its sanction) are undertaken by or imposed on the registered proprietor either at law or in equity.

In the light of the aforesaid, to summarize the position, I agree with the submission of learned counsel for the plaintiffs herein that the defendants herein are volunteers by reason of the registration of the title into their names, being through devolution. They are not and cannot be termed as bona fide purchasers for value for the reason that no consideration emanates from the devolution. In such a situation, their title to the land is defeasible by the equitable interests created and subsisting by the deed of sale and as such, their ownership cannot fall within the rule of indefeasibility as envisaged under s 340(1) of the NLC. The interest created is an interest arising by operation of law and recognizable by s 340(4)(b) of the NLC, and hence the plaintiffs herein cannot be subjected to prove fraud, misrepresentation, forgery or unlawful acquisition as prescribed by s 340(2)(a), (b) and (c) of the NLC in enforcing their statutorily recognizable interests as the interests so created is over and above the statutory exceptions.

Since defeasibility has been established by the general exceptions through the equitable interests created, I shall not go into the respective contentions of the parties regarding the allegation of fraud and the degree of proof thereof in relation to the statutory exceptions of indefeasibility.

In this connection, I wish to add that the failure of the plaintiffs to expeditiously enforce their claim does not amount to negligence disentitling

them to the reliefs sought — *Torrens System* by SK Das, *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330 at p 331; *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202.

I now come to the crux of the relief claimed, namely the declaration that the plaintiffs be registered as co-proprietors of the land and in determining this question, an appraisal of the relevant provisions of the NLC is necessitated.

It is the defendant's contention that the deed of sale even though validly executed, is unenforceable and illegal by reason of its contravention of certain specific provisions of the NLC, and in particular to ss 205 and 136 thereof.

The definition of co-proprietors is to be found in s 342(1) of the NLC wherein co-proprietorship is defined as the 'holding of alienated land by two or more persons or bodies in undivided shares'.

Section 343 of the NLC stipulates the incidents of co-proprietorship in that there is a presumption of equal shares unless the memorial of registration specifies otherwise. A co-proprietor is further empowered to apply for partition and upon his death the share devolves upon his personal representatives.

Though under s 214(1) of the NLC, undivided shares of a co-proprietor can be transferred, nevertheless the express provision of s 205(3) of the NLC has the effect of prohibiting co-proprietorship of agricultural land of less than $^2/_5$ of an hectare.

Section 205(3) states as follows:

> Subject to sub-s (4), no dealings in respect of any alienated land ... subject to the category 'agriculture' or to any condition requiring its use for any agricultural purpose shall be effected if such dealing would have the effect of creating any undivided share of such size that, if the land is to be partitioned in proportion to the several shares, the area of any resulting individual portion would be less than two-fifths of a hectare.

Though the rigours of prohibition as stipulated in s 205(3) of the NLC exists nevertheless it would appear that s 205(4) of the NLC provides an escape mechanism for undivided shares of less than $^2/_5$ acquired prior to 25 March 1985, in that if a co-proprietor of agricultural land holds less than $^2/_5$ of an undivided share prior to 25 March 1985, dealings on his undivided share may still be effected.

The requirements of what constitutes dealings are spelt out by s 206 wherein every dealing under the Act is to be effected by an instrument complying with the requirements of ss 207–212 of the NLC which, inter alia, stipulates that the instrument must be in the statutory form and must, amongst others, specify the shares to be held by the co-proprietors and it must be executed, attested and registered.

However upon a careful appraisal of s 205 of the NLC, it is my considered view that though there appears to be an escape mechanism in s 205(4), nevertheless, a proviso was added to the said subsection by the

National Land Code Amendment Act 1992 to the effect that any such dealings must not only be in respect of the whole land or undivided share, but must also be in favour of one person or one or more co-proprietors of the land.

By reason of the proviso, the exemption provided by sub-s (4) of s 205 is nullified and the prohibition imposed by subsection (3) thereof extends to all agricultural land of less than $^{2}/_{5}$ of an hectare regardless of the date of acquisition.

It is my judgment that the sum total of the prohibitory provisions of s 205(3) and (4) would have the effect of prohibiting the plaintiffs from the relief sought of effecting registration of themselves as co-proprietors of the land herein which is categorized as agricultural land.

This brings me to the question as to what the effect is of the prohibitory provision of s 205 of the NLC on the deed of sale — does it mean that the statutory bar in getting themselves registered as co-proprietors would leave the plaintiffs herein without any remedy whatsoever? Do the rigours of s 205 of the NLC prevent this court from giving effect and preserving the equitable interest of the plaintiffs? In my judgment, the interest of justice dictates that the court should and must come to the aid of the plaintiffs herein, more so in the light of the findings of the equitable interests by way of trusts created and subsisting under the deed of sale.

I hereby rule that the defendants herein do hold the land subject to the constructive trusts created in favour of the plaintiffs pursuant to the terms of the deed of sale and irrevocable power of attorney, and pursuant to s 417 of the NLC, the registrar of titles and/or the land administrator, as the case may be, do cause an endorsement to be entered on the register of titles of the trust aforesaid in favour of the plaintiffs herein and the costs of the action herein be taxed and be paid by the defendants to the plaintiffs.

Plaintiffs' claim allowed in part and plaintiffs' interest be endorsed on the title and costs.

Reported by Moy Saw Han